No. 78-301

IN THE

Supreme Court of the United States

October Term, 1978

EVELYN B. ROSENTHAL, *ET AL.*,
Petitioners,

v.

BRADFORD TRUST COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

JOHN ARTHUR KEEFFE
Attorney for Petitioners
269 Madison Road
Scarsdale, N.Y. 10583
(914) 472-4981

Arthur John Keeffe
of Counsel

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

INDEX

CITATIONS

IN THE

Supreme Court of the United States

October Term, 1978

No.

EVELYN B. ROSENTHAL, *ET AL.*,*
Petitioners,

v.

BRADFORD TRUST COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

---

*Evelyn B. Rosenthal, Maurice Shire, Security National Bank as Trustee for Evert S. & Anna L. Peterson, Mrs. Ruth Foy, Delbert C. & Lois E. Meyer, Vicky Oelbaum, Clarence R. Johnson, George G. Ferullo, Rudolph F. Perger, Sarah B. Simon, Richard H. Crouch, Stanley T. Michael, William Lenzer & Eileen Lenzer, Ethel J. Nutter, Olly Bried, Dr. Eric G. Schweiger, Siegbert J. Weinberger, Joseph Miller, Edgar O. May, Rosemarie S. Littman, Loren Coffey, First U.S. Corporation, Robert H. Ruhl, Lewis L. Fagen, J. Fred Kuhn, Richard H. Courch, Arthur Devincentis, Edward Rubin, Werner Bloch, Harry Evans, Sidney Epstein, Paul A. Powell, Binnie B. Frankovich, Fred Buxbaum, Grant B. Holcomb, Arthur B. Silverman, Florence S. Daniels, Mr. & Mrs. Carl P. Johnson.

OPINIONS BELOW

The opinions below are not reported.

As stated in the Statement, an order was entered on February 16, 1977 dismissing the complaint because there was no answer on the call of the case on the calendar on January 18, 1977 and a notice of the settlement of the order was served on counsel for the Series B Bondholders on February 17, 1977.

On 22 April, 1977, the Plaintiffs, Series B Bondholders, moved to open their default on the calendar call of 18 January, 1977. This motion was denied by an order of June 28, 1977 in which Mr. Justice Nadel of the Supreme Court of the State of New York said:

> "Not only have the plaintiffs failed to set forth a valid excuse for the default, but they have also failed to show that they have a meritorious defense to the defendant's motion to dismiss.
>
> "The judgment of a Maine Court in a related action comments on the plaintiff's claim. That judgment must be afforded full faith and credit, inasmuch as the plaintiffs had a full and fair opportunity to litigate their claim in the Maine action."

The order of June 28, 1977 refusing to open the default was unanimously affirmed by the Appellate Division, First Department of the Supreme Court of the State of New York without opinion and thereafter on 25 May 1978 the Appellate Division denied a motion by Plaintiffs Series B for a rehearing or in the alternative for leave to appeal to the Court of Appeals.

JURISDICTION

The Supreme Court of the State of New York on 28 June 1977 denied plaintiffs' motion to open a default on the hearing of a motion by the defendant to dismiss the complaint. On March 9, 1978 the Appellate Division of the Supreme Court of the State of New York affirmed. Thereafter, plaintiffs moved to reargue their appeal or in the alternative for leave to appeal to the Court of Appeals of the State of New York. On 25 May, 1978, the Appellate Division denied this motion. Pursuant to 28 U.S. Code 1257 and 2101, petitioners apply for certiorari.

QUESTIONS PRESENTED

1. Whether an action in Maine to confirm defendant Trustee's rights to foreclose on Maine assets and distribute them to Series A bondholders is res adjudicata of an action in New York in which Series B Bondholders contend that defendant Trustee misappropriated $287,500.00 of monies belonging to them?

2. Whether dismissing this complaint charging defendant as Trustee of $1,500.00 of Series B Bonds with an intentional breach of trust costing the B Bondholders $287,500, violated the rights of the B Bondholders under the Seventh, Fifth and Fourteenth Amendments?

3. Whether confirmation by way of declaratory judgment of defendant Trustee's right to foreclose on Maine assets and pay off $3,400,000. of series A Bonds guaranteed by the State of Maine bars plaintiff Bondholders who bought their bonds in Wall Street and none of whom are Maine citizens-residents from suing in New York to determine whether the defendant Trustee misappropriated

$287,500. of monies that were to be held in trust for the Series B Bonds?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In the index petitioner has set forth the constitutional provisions involved, namely, the full faith and credit clause, the Seventh Amendment, the Fifth and Fourteenth Amendments.

STATEMENT

This action is brought by Series B revenue bondholders of The Development Corporation for Evergreen Valley of Oxford County, Maine. It was to build a ski and summer resort on land owned by it and leased to an operating company, American Evergreen Resorts, Inc. The Development Corporation was financed by two revenue bond issues exempt from regulation by the Securities and Exchange Commission and underwritten by Glore Forgan, a Wall Street investment banking house, no longer in business. One issue of $3,400,000 was secured as to principal and interest by the State of Maine through the Maine Recreation Authority and its successor, the Maine Guarantee Authority Corporation; the other issue, Series B for $1,150,000 did not carry any guaranty.

Under an Indenture of Trust, dated 1 July 1969, the Franklin National Bank was Trustee. When, in October, 1974, Franklin became insolvent, the Federal Deposit Insurance Corporation arranged with Bradford Trust Company, a New York Trust company, to take over Franklin's duties as Trustee. In addition, American-Evergreen, the proposed

operator, executed an Indenture of Land Trust with Norway National Bank as of 1 July 1969 under which about 770 acres of land adjacent to the Project were to be held in trust as security for the Maine Authority and the Series A Bondholders. Under the Trust Indenture to Franklin, the Development Corporation pledged all revenues it derived from the Project.

The "Official Statement," an 18 page document dated July 11, 1969 and an offering device employed by the sellers of the bonds stated that the Development Corporation had received a firm construction bid of $2,995,000 from Wright American, Inc. which provided for the construction and completion of the Project on or before December 31, 1970. It also stated that Wright American, Inc. had been awarded a construction contract in accord with its bid. But as early as September 1970, no funds remained to pay the contractor, Wright America, and it abandoned the partially completed Project. On March 16, 1971, the Development Corporation terminated the lease of American Evergreen for defaults in the payment of rent. Thereafter, in May, 1971, the Consulting Engineer for the Project estimated that it needed $1,650,000 more to complete for operation. The Development Corporation tried to raise this money by issuing more Series B bonds but failed.

On 5 January, 1973, the Development Corporation entered into a new lease between itself and Exeter North Corporation, a Maine corporation, similar to the lease it had with American Evergreen. Franklin National Bank and the Development Corporation also entered into a Supplemental Trust Indenture with Exeter North to give the Trustee rights in the event Exeter North defaulted in the payment of rent.

On December 1, 1974, Exeter North defaulted in payment of rent due from it to the Development Corporation. This particular default was eventually remedied but on June 1, 1975 Exeter North again defaulted and it was not remedied. However, the Maine Authority eventually advanced the amounts necessary to make the interest payments due on the Series A bonds on July 1, 1975 but the required interest payments on the Series B bonds were not met.

As of October 6, 1975, the Development Corporation terminated the lease of Exeter North. Thereafter the Maine Authority asked Norway National Bank to deed such assets as it held as Land Trustee to it and Norway did so on or about September 19, 1975. The Maine Authority also asked Bradford to foreclose on the Project as authorized by its Indenture.

Originally scheduled for December 11, 1975, the foreclosure sale by Bradford took place on January 28, 1976. The Maine Authority was the only bidder, paying $1,000,000 with a down payment of $225,000.

On February 13, 1976, Bradford closed, conveying title to the Project to the Maine Authority; in all the $3,265,084.88 paid by the Authority represents the principal and interest due on the Series A bonds accrued to February 13, 1976.

Thereafter, on March 12, 1976, the Bradford Trust Company instituted an action in the Superior Court of Oxford County, Maine confirming that the sale was according to law and approving the proposed distribution of the proceeds. Besides the Development Corporation, Maine Guarantee Authority, Exeter North Corporation, E. Jerome McConnell and Associates, International Supply Corporation and Guy

Gannett Publishing Co., two holders of Series A bonds (First National Bank of Boston and H. Paul Block) and two holders of Series B bonds (Eric G. Schweizer and Rudolph F. Perger) were joined as defendants.

On December 23, 1976, a motion was made by Maine counsel before the Superior Court of Maine to relieve Messrs. Schweizer and Perger from a December 22, 1976 order of the Superior Court granting summary judgment in the Bradford Trust Co.'s action for declaratory judgment on the ground that the Maine court lacked personal jurisdiction of them. This motion was denied.

Accordingly, Bradford Trust Company was granted against the B series bondholders the relief it had asked in its action for declaratory judgment, namely, the following:

1. Its action was held to be maintainable as a class action;
2. The exercise by Bradford Trust of its power to sell the Project under the Indenture was carried out in full compliance with the terms of the Indenture and applicable Maine law;
3. Bradford lawfully conveyed to the Maine Authority all the property held under the Indenture;
4. The disbursement by Bradford of the proceeds of the sale and other moneys held by the Trustee in accordance with Section 813 of the Indenture is consistent with the terms of the Indenture and applicable law; and,
5. Exeter North should pay Bradford $840,319.93 interest and costs in respect of its obligations under the lease.

This particular action was commenced in the Supreme Court of the State of New York on October 18, 1976 and the complaint was amended on December 16, 1977.

The plaintiffs are some 40 series B bondholders who sought in this action "to enjoin" Bradford Trust Company from prosecuting in any other court, state or federal, "the transactions and occurrences which are the subject of this action."

Two of the B Bondholders who are plaintiffs in this action (Namely Dr. Eric G. Schweizer of 929 Park Ave., New York, N.Y. 10028, who owns 5 bonds; and, Rudolph F. Perger of 127 John St., 20th floor, New York, N.Y. 10038, who owns 5 bonds) are also defendants in the declaratory judgment action in the Superior Court, Oxford County, Maine and both were served in New York.

The complaint alleges that under the Indenture the Trustee was to set up some five separate accounts, one of which was a so-called "Series B Interest Account."

In particular, Paragraph 6, page 5 of the "Official Statement" issued by the Development Corporation for Evergreen Valley and used to solicit purchases of B Bonds states:

> "A Reserve Account equal to two (2) years interest charges on the Bonds will be established, one (1) year from bond proceeds and an additional one (1) year to be deposited by American-Evergreen Resorts, Inc., $175,000 upon delivery of the Bonds and, upon completion of the Project, whatever additional amount is required to make the amount then on deposit to two (2) years' interest on all bonds outstanding. Such account is to be increased to and maintained in an amount equal to 25% of the principal amount

> of all Bonds outstanding less the total amount on deposit to the credit of the Series A Redemption Account and Series B Redemption Account."

The same Reserve Account is also described in Section 505 of the Trust Indenture. On or about October 8, 1974 when Bradford succeeded Franklin as Trustee there were sufficient funds on deposit in this so-called Reserve Account to comply with the requirement that such account "is to be increased to and maintained in an amount equal to 25% of the principal amount of all Bonds outstanding less the total amount on deposit to the credit of the Series A Redemption Account and Series B Redemption Account."

However, as previously stated on or about December 1, 1974, Exeter North Corporation defaulted in paying rent due under its January 5, 1973 lease and these rent payments "were the only source of revenue available to [the Development Corporation] towards payment on the Bonds."

The amended complaint in this action alleges that to remedy this default of Exeter North, that Bradford "withdrew funds then on deposit in the Reserve Account and used funds to prevent a default in the January 1, 1975 payment on the Series A and Series B Bonds."

Plaintiffs further allege that "even if the aforesaid withdrawal was warranted under the terms and provisions of the Trust Indenture, defendant was under a collateral obligation to increase and maintain the aforesaid Reserve Account" in the 25% amount as specified.

It is further alleged that Bradford as Trustee further transferred monies from the five separate accounts (Series A Bond Interest Account, Series A Redemption Account, Series B Bond Interest Account, Series B Redemption

Account and Revenue Bonds Reserve Account) mentioned in Sections 208 and 505 of the Trust Indenture to the Construction Fund Account referred to in Section 401 of the Trust Indenture. The effect was to make the Series A Bondholders fully secured and increase the risk to the Series B Bondholders.

As a result the amended complaint alleges that defendant Bradford Trust Company "failed to comply with the duties and responsibilities required of it in the Trust Indenture and the representations contained in the 'Official Statement' and has breached its fiduciary duty to maintain the funds in the designated accounts . . . ."

As of January 28, 1976 defendant Bradford Trust Company held $5,771.94 in the Revenue Fund established under Section 503 of the Trust Indenture, $18,787.42 in the Construction Fund established under Section 401 of the Trust Indenture and $ .01 in the aforesaid Reserve Account.

Accordingly in the first cause of action alleged in the amended complaint the plaintiffs allege they have the right to recover $287,500.00 plus interest, an amount equal to 25% of the principal amount of the Series B Bonds and $500,000 a punitive damages.

The amended complaint also alleges that this "aforesaid breach of fiduciary duty by defendant, Bradford Trust Company, was intentional, willful, and committed in utter disregard of the interests of the Series B Bondholders."

In a second cause of action the amended complaint alleges that on March 12, 1976, Bradford commenced its above-mentioned action for declaratory judgment of its disposition of the assets derived from its foreclosure sale in Oxford County, Maine.

In that connection on February 18, 1976, Bradford is alleged to have mailed to Series B Bondholders a "Report to the Holders of The Development Corporation for Evergreen Valley Series A and Series B Bonds" in which it stated that formal notice of intended legal proceedings in the Superior Court of Oxford County, Maine would follow. It is alleged no such formal notice followed and plaintiffs "were completely unaware that a legal proceeding had, in fact, been commenced" except that on or about 7 September 1976 a "Notice of Pendency of Action" was mailed to each owner of record on the books of the Development Corporation as kept by Bradford as Trustee.

In this notice of pendency the Bondholders are told that on February 13, 1976 after foreclosing on the Project on January 28, 1976 that Bradford conveyed the property to the Maine Guarantee Authority and the Maine Authority paid to Bradford a sum sufficient to pay the principal and interest on the Series A Bonds.

The Notice of Pendency goes on to state that on March 12, 1976 that Bradford, as Trustee, "commenced this civil action in the Oxford County (Maine) Superior Court to confirm its actions in exercising the power of sale contained in the Indenture and to obtain instructions from the Court as to the disposition of the money received by the Trustee from the Maine Guarantee Authority."

In this Notice of Pendency, Bradford also stated that:

> "Members of the class consisting of Series B bondholders should be aware that their bonds were not insured by the Maine Guarantee Authority and that the partial summary judgment does not provide for payment to them and that there are no additional proceeds from the sale by the

> Trustee of the property subject to the Indenture or any other funds currently available or which will become available to the Trustee to make any payment in respect of the Series B Bonds."

Under date of 14 December, 1976, defendant Bradford Trust Company moved before the Supreme Court of the State of New York, New York County, to dismiss the complaint "upon the grounds of res judicata, pursuant to CPLR Section 3211(a)(5) or in the alternative, that there is another action pending between the same parties for the same cause of action in a Court in the State of Maine pursuant to CPLR Section 3211(a)(4)."

The motion came regularly on to be heard before Mr. Justice Bernard Nadel at Special Term Part I of the Supreme Court of the State of New York on 18 January 1977 and there being no answer on the calendar call of the motion, Justice Nadel entered judgment for defendant Bradford Trust Company and dismissed the complaint by an order dated February 16, 1977, a notice of the settlement of which was served on counsel for the B Bondholders on February 17, 1977.

Under date of April 22, 1977 counsel for the plaintiff Series B Bondholders moved to open the default explaining that he failed to answer the calendar call because he was on a business trip from January 4, 1977 to February 26, 1977. Counsel states that he requested an adjournment from counsel for the Bradford Trust Company which they refused. A request to the Court for an adjournment was filed on January 20, 1977.

By order dated June 28, 1977, Mr. Justice Bernard Nadel denied plaintiff Series B Bondholders motion to open the calendar default and permit plaintiffs to argue

against defendant Bradford Trust Company's motion to dismiss their complaint saying:

> "Not only have the plaintiffs failed to set forth a valid excuse for the default, but they have also failed to show that they have a meritorious defense to the defendant's motion to dismiss.
>
> "The judgment of a Maine court in a related action comments on the plaintiff's claim. That judgment must be afforded full faith and credit, inasmuch as the plaintiffs had a full and fair opportunity to litigate their claim in the Maine action."

Plaintiffs, Series B Bondholers, then appealed the order of Justice Nadel of June 28, 1977 to the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department in the County of New York which on March 9, 1978 unanimously denied their application to set aside the calendar dafault.

Thereafter, plaintiffs, Series B Bondholders moved for "rehearing and reversal or for leave to appeal to the Court of Appeals on the ground that there have been serious matters pertaining to the constitutional rights of the Plaintiffs-Appellants determined adversely herein that involve the Constitution of the State and the United States, to wit, the right to trial under the Seventh Amendment of the U. S. Constitution, the due process clause of the Fourteenth Amendment, and the full faith and credit clause of the U.S. Constitution."

On 25 May, 1978, the Appellate Division of the Supreme Court of the State of New York for the First Judi-

cial Department in the County of New York, unanimously without opinion denied the motion for rehearing or in the alternative for leave to appeal to the Court of Appeals of the State of New York.

ARGUMENT

Defendant is a large New York trust company doing a national business and it is accused in the amended complaint in this action of wrongfully withdrawing $287,500 from a Reserve Account set up to protect the Series B Bondholders. The charge is that Bradford did this to prevent a default in the payment of interest on $3,400,000 of Series A and $1,150,000 of Series B Bonds and that, even if authorized to withdraw, Bradford was obligated to repay the $287,500 to the Reserve Account for the B Bonds.

"The Serious Accusations Against Bradford."

According to the amended complaint, the net effect of what Bradford did in transferring monies from five separate accounts was to make the Series A Bondholders fully secured and increase the risk to the Series B Bondholders.

Moreover, the complaint alleges that Bradford,

> "failed to comply with the duties and responsibilities required of it in the Trust Indenture and the representations contained in the 'Official Statement' and has breached its fiduciary duty to maintain the funds in the designated accounts . . . ."

and goes on to allege that the,

> "aforesaid breach of fiduciary duty by defendant, Bradford Trust Company was intentional,

> willful and committed in utter disregard of the interests of the Series B Bondholders."

The Peculiar Bond Issue

The Court should note that the two bond issues involved in this case are so-called state revenue bonds which do not have to be registered with the Securities and Exchange Commission. The Series A Bonds, guaranteed as to principal and interest by the State of Maine were for $3,400,000 and the Series B Bonds, not guaranteed by anybody, and at issue here, were for $1,150,000.

Bonds of this type are sold by means of a so-called "Official Statement" which serves as a prospectus. It is in this document that Glore Forgan, the underwriter, represented that if you buy one of these Series B Bonds there will always be on deposit with Franklin National Bank (Bradford's predecessor Trustee) $287,500 to protect your investment.

To dismiss this complaint because of a failure to answer the calendar call of a motion to dismiss violates the Seventh Amendment in that it substitutes trial by Judge for trial by jury.

Furthermore, it raises a grave question of procedural due process of law, the privileges and immunities of citizens of the United States and equal protection. Bradford is a Trustee of an unsecured bond issue except for its obligation as Trustee to keep $287,500 on deposit for the Series B Bonds.

Does the large and distinguished Wall Street law firm that is counsel for Bradford have the legal and ethical right

to use the calendar default to enter judgment dismissing the complaint of these Series B Bondholders?

This bond issue totals $1,150,000. It is a national issue of bonds for sale to the American public. It is not the single practicioner who failed to answer the calendar call of the motion who suffers. It is the bondholders who hold the bonds, not to mention their widows and orphans.

The Extenuating Circumstances Relating To The Default

Petitioners do not question but that the failure of their lawyer to answer the calendar call of the defendant Bradford Trust's motion to dismiss the complaint was a serious matter.

There is this, however, to be said about it. Before the motion was called on January 16, 1977 counsel for Bradford Trust Company knew that the lawyer for the Series B Bondholders was out of the city, if not the country. Nevertheless, it refused to adjourn the motion.

An affidavit explaining counsel's absence was filed with the Court on January 20, 1977 and an order dismissing the action was not entered until February 16, 1977.

Thereafter, on April 22, 1977, when counsel for Bradford refused to waive, plaintiffs moved to reopen the default.

It is a fair statement of the law of defaults that courts in New York, as Courts elsewhere, regularly open defaults, if convinced that the applying party has a meritorious case.

In all honesty, it must be said that neither Justice Nadel at the New York Special Term motion part nor the Appel-

late Division, First Department dismissed the Complaint because of the calendar default. Both did so because they were erroneously convinced by counsel for Bradford that an action Bradford brought in Maine for a declaratory judgment was *res adjudicata*.

The issue here, therefore, as the issue below, does not concern the calendar default but rather whether the Maine judgment is *res adjudicata*.

It is for this reason that we have so meticulously stated the facts with respect to the Maine action for declaratory judgment.

To begin with, when the bonds went into default, Bradford took steps to foreclose on the assets in Maine and collect from the State of Maine on its guaranty of the $3,400,000 Series A Bonds. It then brought in Maine an equity action to confirm that it had acted properly in foreclosing on the Maine assets and paying out the Series A Bonds with monies supplied by the State of Maine.

There was no request in the prayers for relief in the Maine declaratory judgment complaint that the Maine Court decide whether in failing to keep $287,500 on deposit for the Series B Bonds, the Bradford Trust Company had acted properly or committed a breach of trust.

Moreover, when Mr. Justice Nadel in his order of June 28, 1977 states that,

> "The judgment of a Maine court in a related action comments on the plaintiff's claim."

and goes on to say that the Maine judgment must be afforded full faith and credit inasmuch as the plaintiffs had a full and fair opportunity to litigate their claim in the

Maine action, this simply is not a true statement of the facts.

Under *Shaffer v. Heitner,* 433 U.S. 186 (1977) jurisdiction in the Maine action was limited to confirm the sale of the Maine assets and the payment by Bradford of the principal and inerest of the Series A Bonds.

Counsel for Bradford in moving to dismiss the complaint acted on the false assumption that the Maine declaratory judgment action filed March 12, 1976 was *res adjudicata* of this action which plaintiffs filed on October 18, 1976 merely because in the Maine action Bradford had joined and served two Series B Bondholders both of whom are plaintiffs in this action and because Maine counsel for plaintiffs had sought and failed to obtain a declaration that Maine had no jurisdiction over the B Bondholders with respect to the Maine assets of the Development Corporation situated there.

As the "Notice of Pendency" mailed to the Series B Bondholders in September 1976 states the civil action commenced in Superior Court, Oxford County, Maine was to confirm Bradford's

> "actions in exercising the power of sale contained in the Indenture and to obtain instructions from the Court as to the disposition of the moneys received by the Trustee from the Maine Guarantee Authority."

The Notice of Pendency also told the B Bondholders what they already knew, namely, that the State of Maine had guaranteed the payment of the A Bonds but not the B Bonds and that,

> "there are no additional proceeds from the sale by the Trustee of the property subject to the Indenture *or any other funds currently available or which will become available* to the Trustee to make any payment in respect of the Series B Bonds." (Emphasis Supplied)

Likewise, the fourth prayer for relief in the Maine declaratory judgment suit reads this way:

> "(4) That disbursement by Plaintiff of the proceeds of the sale *and other moneys* held by the Trustee in accordance with Section 813 of the Indenture will be a valid exercise of its fiduciary obligations and will be consistent with the terms of the Indenture and applicable law." (Emphasis Supplied)

Apparently counsel for Bradford interpreted the above phrase "other moneys" and the similar phrase in the fourth prayer for relief, "or any other funds currently available" as submitting to the Maine Court the question whether Bradford had committed a breach of trust in not having $287,500 on hand for the Series B Bonds.

This tortures the language in both the above prayer for relief and notice of pendency. Such vague language could never be *res adjudicata* of the serious accusations of breach of trust which plaintiffs here level against the Bradford Trust Company.

Nor can Bradford bolster this weak argument by contending that, when the declaratory judgment action was served on two individual Series B Bondholders in far off Superior Court in Oxford County, Maine, these two bondholders were required to raise in the Maine action whether

Bradford had committed a breach of trust as the complaint here alleges. In other words, the plaintiffs have the gall to argue that these two individual bond holders so represented all Series B Bondholders that the Maine action subjected them to raising the claim here – that the action here in New York was in effect a compulsory counterclaim in the Maine action for a declaratory judgment to confirm the sale of the assets and the pay off of the Series A Bonds.

Our answer is that the New York action did not concern either the sale of the Maine assets or the collection of the guaranty of the State of Maine. The claim of the Plaintiffs does not arise out of the same transaction as the Maine lawsuit.

As the Statement of Facts in this Petition meticulously points out, there is not one line in the Maine action with respect to Plaintiff's charge that Bradford misappropriated $287,500.

The Maine action was for a declaratory judgment to confirm the payment of principal and interest by Bradford to the Series A Bondholders. There was no submission by Bradford or Plaintiffs of the question whether Bradford committed a breach of trust in its handling of the Reserve Account for the B Bondholders. Nor, even though the action was a "related" one, was there any "comment" in the Maine action of Plaintiffs' claim that Bradford had mishandled funds of the Series B Bonds.

The action for declaratory judgment in Maine rests primarily on the assets there. It was an *in rem* action to confirm the sale of the Maine assets and the payment by the Trustee of principal and interest to the Series A Bondholders. To protect itself from charges that it mishandled

the payment of $3,400,000 to the Series A Bondholders, Bradford brought its action for declaratory judgment in Maine.

Under Mr. Justice Marshall's opinion for this Court in *Shaffer v. Heitner*, there was no way by which *Bradford Trust Company* could serve two Series B Bondholders (Dr. Eric G. Schweizer of 929 Park Ave., New York, N.Y. 10028, an holder of 5 bonds; and, Rudolf F. Perger of 127 John St., 20th Floor, New York, N.Y. 10038, also a holder of 5 bonds) in such an action and obtain a judgment that it did not mishandle the $287,500 in question here. Nor did Bradford Trust Company seek to do so in its prayers for relief in that Maine action. From beginning to end, the relief sought in the Maine action concerned the payment by Bradford of the principal and interest due on the Series A bonds.

The Maine judgment cannot be tortured into meaning any more than that.

Both the Judge at the Motion Part and the Appellate Division were badly misled by the extravagant claims of counsel for Bradford as to the effect of the Maine judgment.

The Jurisdiction of The New York Courts

What is most important to keep in mind is that this issue of $1,150,000 was sold to the American public, not in Maine, but in Wall Street.

The Plaintiffs, each suing individually, are residents of New York, California, Virginia, Massachusetts, Texas, Missouri, Tennessee, Florida, Connecticut and New Jersey. None are residents of Maine, and none, accordingly, have

had such "minimal contacts" with Maine that under any of the tests of jurisdiction the State of Maine could assert jurisdiction over them for any purpose.

The Defendant is and was a New York Trust Company, and has and maintains its principal place of business as a Post Office Box number at Grand Central Station in New York, New York. It has never, to anyone's knowledge, had any offices in Maine.

The notices sent to the B bondholders were inadequate to advise them of anything save that the proceeds of the foreclosure sale were inadequate to provide money to other than the A bondholders.

CONCLUSION

To suggest that these 40 some Series B Bondholders are not free to have the New York courts decide whether Bradford should have kept on deposit 25% of the principal and interest due on the Series B Bonds as the Development Corporation promised the bondholders to do, is wrong. The place to litigate what the maker of the bonds promised to do is where the bonds were sold.

This lack of jurisdiction over the B bondholders is fatal to any claim of full faith and credit for the Maine judgment. The Court so stated in *Hanson v. Denckla,* 357 U.S. 235 (1958):

> "Even before passage of the Fourteenth Amendment this Court sustained state courts in refusing full faith and credit to judgments entered by courts that were without jurisdiction over non-resident defendants. * * * Since Delaware was entitled to conclude that Florida law made the

> trust company an indispensable party, it was under no obligation to give the Florida judgment any faith and credit – even against parties over whom Florida's jurisdiction was unquestioned." P. 255.

As this Court said in *Shaffer v. Heitner, supra.*

> "The case for applying to jurisdiction *in rem* the same test of "fair play and substantial justice" as governs assertions of jurisdiction *in personam* is simple and straightforward. It is premised on recognition that "(t)he phrase, 'judicial jurisdiction over a thing,' is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." Restatement (Second) of Conflict of Laws Sec. 56, Introductory note. (1971) * * *. This recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem,* the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in a thing." The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum contacts standard elucidated in *International Shoe,* [326 U.S. 310 (1946)]."

From all of which, the Court can see that in flagrant violation of both their Seventh Amendment and Fourteenth Amendment rights, the Supreme Court of the State of New York has wrongfully dismissed plaintiff bondholders complaint charging Bradford Trust Company with misappropriating $287,500 that sellers of the $1,150,000 of Series B Bonds assured purchasers would be available to protect their investment.

On these serious accusations of breach of trust, plaintiff bondholders deserve their day in court. The Maine action for declaratory judgment is not *res adjudicata* of this New York action and the order dismissing the complaint should be reversed.

Respectfully submitted,

JOHN ARTHUR KEEFFE
269 Madison Road
Scarsdale, N. Y. 10583
(914) 472-4981
Attorney for Petitioners

ARTHUR JOHN KEEFFE
Of Counsel

APPENDIX

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 25, 1978

Present—Hon. Samuel J. Silverman, Justice Presiding
Herbert B. Evans
J. Robert Lynch
Leonard H. Sandler
Joseph P. Sullivan, Justices.

(Rec'd 5/27/78)

Evelyn B. Rosenthal, Maurice Shire, et al., Plaintiffs-Appellants, -against- Bradford Trust Company, Defendant-Respondent.	M-1247

The above named plaintiffs-appellants having moved for leave to reargue their appeal from the order of the Supreme Court, New York County, entered on June 28, 1977, which order was unanimously affirmed by order of this Court entered on March 9, 1978, or in the alternative for leave to appeal to the Court of Appeals and for other relief,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the statements of John A. Keefe in support of said motion, and the memorandum of Messrs. LeBoeuf, Lamb & MacRae in opposition thereto, and after hearing Mr. John A. Keefe for the motion, and Messrs. LeBoeuf, Lamb, Leiby & MacRae opposed,

It is ordered that said motion be and the same is hereby denied with $20 costs.

ENTER: JOSEPH J. LUCCHI
Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 9, 1978.

Present–Honr. Samuel J. Silverman, Justice Presiding
Herbert B. Evans
J. Robert Lynch
Leonard H. Sandler
Joseph P. Sullivan, Justice.

Evelyn B. Rosenthal, Maurice Shire, Security National Bank as trustee for Evert S. & Anna L. Peterson, Mrs. Ruth Foy, Delbert C. & Lois E. Meyer, Vicky Oelbaum, Clarence R. Johnson, George G. Ferullo, Rudolph F. Perger, Sarah B. Simon, Richard H. Crouch, Stanley T. Michael, William Lenzer & Eileen Lenzer, Ethel J. Nutter, Olly Fried, Dr. Eric G. Schweiger, Siegbert J. Weinberger, Joseph Miller, Edgar O. May, Rosemarie S. Littman, Loren Coffey, First U.S. Corporation, Robert H. Ruhl, Lewis L. Fagen, J. Fred Kuhn, Richard H. Crouch, Arthur Devincentis, Edward Rubin, Werner Bloch, Harry Evans, Sidney Epstein, Paul A. Powell, Binnie B. Frankovich, Fred Buxbaum, Grant B. Holcomb, Arthur B. Silverman, Florence S. Daniels, Mr. & Mrs. Carl P. Johnson,

Plaintiffs-Appellants,

-against-

Bradford Trust Company,

Defendant-Respondent.

2117N

An appeal having been taken to this Court by the plaintiffs-appellants from the order of the Supreme Court, New

York County (Nadel, J.), entered on June 28, 1977, which denied their application to set aside a calendar default,

And said appeal having been argued by Mr. John A. Keeffe of counsel for the appellants and by Mr. Taylor R. Briggs of counsel for the respondent, and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed, and that the respondent shall recover of the appellants $40 costs and disbursements of this appeal

ENTER: JOSEPH J. LUCCHI
Clerk.

ORDER APPEALED FROM
(pp. 4-5)

SUPREME COURT OF THE STATE OF NEW YORK,
SPECIAL TERM PART I,
NEW YORK COUNTY
at the Courthouse thereof,
60 Centre Street, New York, New York 10007

Present: Hon. BERNARD NADEL
Justice

EVELYN B. ROSENTHAL, et al,

-against-

BRADFORD TRUST CO.

The following papers numbered 1 to 25 read on this motion referred:

No. 261 on Calendar of May 27, 1977	Papers Numered
Notice of Motion-Order to Show Cause-and Affidavits Annexed	1-10
Answering Affidavit	11-24
Order of Nadel, J. of 6/18/77	25

Upon the foregoing papers this motion by the plaintiffs to set aside a prior order herein is deemed a motion to vacate the default. The motion is denied. Not only have the plaintiffs failed to set forth a valid excuse for the default, but they have also failed to show that they have a meritorious defense to the defendant's motion to dismiss.

The judgment of a Maine court in a related action comments on the plaintiff's claim. That judgment must be afforded full faith and credit, inasmuch as the plaintiffs had a full and fair opportunity to litigate their claims in the Maine action.

Dated: 6/23/77

FILED
JUN 28 1977
NEW YORK
CO. CLERK'S OFFICE

Briefs: Plaintiff's X Defendant's X

County Clerk's No. 19043, 1976

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-301

EVELYN B. ROSENTHAL, *et al.*,

Petitioners,

v.

BRADFORD TRUST COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

TAYLOR R. BRIGGS
Attorney for Respondent
140 Broadway
New York, New York 10005
(212) 269-1100

Of Counsel:

LEBOEUF, LAMB, LEIBY & MACRAE

September 22, 1978

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-301

EVELYN B. ROSENTHAL, *et al.*,

Petitioners,

v.

BRADFORD TRUST COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The three opinions and orders below, none of which was rendered by the highest New York court from which a decision could be had, are set forth in Petitioners' Appendix at 1a, and are not officially reported other than the initial affirmance by the Appellate Division which is noted at 61 A.D. 2d 1144 (1978).

JURISDICTION

Respondent submits that this Court lacks jurisdiction to hear this matter. Although Petitioners purport to find jurisdiction pursuant to 28 U.S.C. § 1257, they do not come within the terms of those provisions and the petition should be denied.

QUESTION PRESENTED

Where Petitioners have made no effort to request the highest court of a state to exercise its constitutional and statutory discretionary power to review the decision of an intermediate appellate court, which affirmed the lower court's findings of inexcusable default and *res judicata* requiring the dismissal of Petitioners' claims, will this Court review the judgment of the intermediate appellate state court?

STATUTES INVOLVED

Respondent's argument noting this Court's lack of jurisdiction is premised upon 28 U.S.C. § 1257, and New York Civil Practice Law and Rules, § 5602(a), which provides in pertinent part, emphasis supplied:

> § 5602. Appeals to the court of appeals by permission
>
> (a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, *or by permission of the court of appeals upon refusal by the appellate division* or upon direct application:
>
> 1. in an action originating in the supreme court, . . .
>
> (i) from an order of the appellate division which finally determines the action and which is not appealable as of right, ...

This statutory provision for discretionary action by the Court of Appeals parallels New York constitutional dictates: N.Y. Const. art. VI, § 3(b)(6), which in addition provides:

> Such an appeal shall be allowed when required in the interest of substantial justice.

Statutes which support the New York lower and intermediate court decisions, assuming they were reviewable here, include U.S. Const. art. IV, § 1 and 28 U.S.C. § 1738, which require that the Maine court proceeding and judgment be binding on Petitioners, who appeared individually and by class representative therein, and N.Y. CPLR § 5015(a) pursuant to which the New York courts denied Petitioners' petition to vacate their default.

ARGUMENT

I

This Court Lacks Jurisdiction to Review the Decision of the New York State Intermediate Appellate Court.

Petitioners brought their action in an inferior New York state court: New York State Supreme Court, New York County. When their action was dismissed by an opinion and order of a justice thereof (Pet. App. 5a-6a), New York State procedure permitted them to appeal to the Appellate Division of the Supreme Court, First Judicial Department, which they did, and the inferior court's orders were unanimously affirmed. Pet. App. 3a-4a. Petitioners then moved in the Appellate Division alternatively for rehearing or for leave to appeal to the New York State Court of Appeals, the State's highest court, and that motion was denied. Pet. App. 1a-2a.

The New York statute explicitly provides in these circumstances[1] that "[a]n appeal may be taken to the court

1. Petitioners never attempted to take an appeal as of right, which would have lain had the Appellate Division's decision directly involved a substantial constitutional question. N.Y. CPLR § 5601(b)(1).

of appeals . . . by permission of the court of appeals upon refusal by the appellate division. . . ." N.Y. CPLR § 5602(a).[2]

Actual practice was recently summarized succinctly by a distinguished Appellate Division justice. Hopkins, *The Role of an Intermediate Appellate Court,* 41 Bklyn L. Rev. 459, 468 (1975).

> The statute that confers the power in most instances allows the litigant denied the right to appeal by the intermediate court to apply again to the highest court.[18] Thus, nothing has been lost if the intermediate court denies the first application for leave to appeal.

18. *See, e.g.,* N.Y. Civ. Prac. L. & Rules § 5602(a) (McKinney 1974)

Petitioners never sought that permission from the Court of Appeals, and thus the highest court of New York State which could have rendered a decision on the propriety of the lower court orders dismissing Petitioners' case was never given the opportunity to rule.

This Court has no power to review any other judgments of the courts of a state than those of the highest court in which a decision in the suit could be had. *Fisher* v. *Perkins,* 122 U.S. 522 (1887). Petitioners improperly invite this Court to assume jurisdiction by exercising an authority which it does not have, that is, to indulge in conjecture as to what would or would not have been the judgment of the New York State Court of Appeals had it been called upon to exert the discretion invested in it by New York State law. *Stratton* v. *Stratton,* 239 U.S. 55 (1915); *Matthews* v. *Huwe,* 269 U.S. 262 (1925). Not only has this Court gen-

2. New York's appellate scheme is consonant with due process. *Javits* v. *Stevens,* 382 F. Supp. 131, 140 (S.D.N.Y. 1974).

erally made clear that the course followed by Petitioners simply has not exhausted all the remedies for review by state courts, it specifically has so ruled with respect to New York State's appellate court procedures. *Southern Electric Co.* v. *Stoddard,* 269 U.S. 186 (1925).

Because the decision of the Appellate Division, First Judicial Department, was not the last state court in which a decision of Petitioners' purported constitutional questions could be had, jurisdiction does not lie and the petition must be dismissed.

II

There is no Substance to the Petition for Certiorari.

Petitioners are members of a class of "B bondholders;" that is, purchasers of $1,150,000 in revenue bonds of 1969, Series B, dated July 1, 1969, of the Development Corporation for Evergreen Valley, Maine. Petitioners seek review here of New York rulings that a decision of the Superior Court of the State of Maine, Oxford County, Docket No. 76-40, in a previously commenced action entitled "Bradford Trust Company, as Trustee, Plaintiff v. The Development Corporation of Evergreen Valley, et al., Defendants," and in which Petitioners' class had participated, was *res judicata* barring a redetermination of their rights against Respondent, successor trustee under the Maine indenture.

In the Maine action Respondent had sought judicial confirmation of its plans for "satisfying any fiduciary obligations it may have to the bondholders."[3] Defendants included the Maine Development Corporation, the Maine Guarantee Authority (a Maine public instrumentality),

3. Complaint (R. 68 below); quoted language is from motion for judgment (R. 78 below) in Maine action.

corporate creditors from Massachusetts, Illinois, and Maine, representatives of the class of "Series A" bondholders, and:

> Eric G. Schweiger of the City and State of New York, and Rudolph F. Perger of the City and State of New York, individually and on behalf of a class consisting of holders and owners of the Revenue Bonds of 1969, Series B issued by The Development Corporation for Evergreen Valley.

On October 19, 1976 Maine counsel wrote to the Maine court:

> This letter will confirm my entry of appearance on this date as counsel of record for those Defendants representing the class of holders and owners of Series B 1969 Revenue Bonds issued by the Development Corporation for Evergreen Valley.

Respondent sought and subsequently obtained from the Maine court an order that directed and approved a disposition of the entire corpus of the trust. The Maine court, after hearing the objections of the B bondholders, approved a disposition which resulted in payment to the A bondholders, but not to the B bondholders. The judgment in the Maine action determined:

(a) that payment of the remaining trust assets by Respondent to the Series A bondholders, rather than to the Series B bondholders, was a valid exercise of Respondent's fiduciary obligations, consistent with the terms of the indenture trust and applicable law; and

(b) that the Maine court had personal jurisdiction over Petitioners Schweiger and Perger "as representatives of a class consisting of the holders and owners of Series B 1969 Revenue Bonds." (R. 60 below).

Petitioners did not appeal the Maine judgment, but in the action below sought to impeach the Maine judgment and to obtain the opposite result: a determination that they had been entitled to a portion of those funds, that the payment to the A bondholders therefore had been improper, and that the Maine court had lacked jurisdiction over them. The determination by the Maine court was not subject to collateral attack in the New York action, because the jurisdictional question had already been litigated and decided in Maine. *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U.S. 522 (1931). All of the petitioners actually appeared in the Maine proceeding through counsel as members of the class of defendants there, after personal service on some of the class, mailed notice to many others, and newspaper publication. They were thus all bound by the Maine judgment, and the New York courts so found, correctly.[4]

The decisions below involved no novel doctrine nor departure from any ruling of this Court. Were the Maine court's finding of its jurisdiction over Petitioners subject to collateral attack in a New York action and available for review here it would be evident that this is merely one of "the vast majority of cases" in which "the fairness stan-

4. The record before the New York courts included the following:

(1) an account of the B bondholders' intention to appear and participate in the Maine action, preamble to Order of October 8, 1976; (2) an entry of appearance by the B bondholders' Maine counsel; (3) motions by the B bondholders, dated October 19 and 27, 1976, alleging lack of jurisdiction over the B bondholders; (4) an account of the hearing which decided the jurisdictional question; (5) the resulting orders denying B bondholders' motions; (6) the Final Order in the Maine proceeding, which explicitly binds the B bondholders to the judgment therein; (7) the B bondholders' motions for relief from judgment, dated December 23, 1976; and (8) the order denying the B bondholders' motion for relief from judgment.

dard" of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945) "can be easily applied." *Cf. Shaffer* v. *Heitner*, 433 U.S. 186, at 211 (1977).

CONCLUSION

For the foregoing reasons Respondent submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

TAYLOR R. BRIGGS
Attorney for Respondent
140 Broadway
New York, New York 10005
(212) 269-1100

Of Counsel:
LEBOEUF, LAMB, LEIBY & MACRAE

September 22, 1978